1967

The State Of Utah v. Agoberto Garcia Jasso : Defendant-Appellant's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,
Plaintiff and Respondent,

vs.

AGOBERTO GARCIA JASSO,
Defendant and Appellant.

Case No. 11004

DEFENDANT–APPELLANT'S BRIEF

Appeal from the Judgment of the Second District Court for Weber County
Honorable John F. Wahlquist, Judge

Ronald O. Hyde
505 First Security Bank Bldg.
Ogden, Utah 84401

Dale E. Stratford
2640 Washington Blvd.
Ogden, Utah 84401

Attorneys for Appellant

Phil L. Hansen
Attorney General
State Capitol Bldg.
Salt Lake City, Utah 84114

Attorney for the Respondent

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STATEMENT OF KIND OF CASE

This is a prosecution for unlawful possession of a marijuana.

DISPOSITION IN LOWER COURT

A Motion to Suppress was brought by the Defendant and was denied. The case was tried to the Court. From a judgment of guilty, Defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the Order denying Defendant's Motion to Suppress and reversal of the conviction.

STATEMENT OF FACTS*

The evidence of possession of marijuana that was used as the basis of the conviction of the Defendant was obtained through a search of the Defendant's home. The search was made under the authority of a Search Warrant signed by Judge Glenn J. Mecham of the Ogden City Court (R1-B). The Search Warrant was issued at the request of Sergeant Hal R. Adair of the Ogden City Police Department, who had pre-prepared an Affidavit for Search and Seizure Warrant and a Search and Seizure Warrant (T 14) and taken them to the Judge's home late at night. Sergeant Adair swore to the Affidavit (T.P.H. 4) which stated, (R1-A), "And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows: Based on information immediately afforded me, I have probable cause to believe that mari-

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* R means Record on Appeal
T. means Transcript of Trial
T.P.H. means Transcript of Preliminary Hearing
T.A. means Transcript of proceeding of February 27, 1967, filed as additional record on appeal.
T.B. means Transcript of proceedings of March 6, 1967, filed as additional record on appeal.

juana is presently being concealed at the residence of Agolberto J. Garcia at 660 23rd Street, Ogden, Utah."

Defendant moved to suppress the evidence so obtained (R 4). At the conclusion of the argument on the motion, Judge Wahlquist ruled (T.A. 1, 2) that under the law of the State of Utah the Affidavit filed was insufficient to support a valid Search Warrant, but allowed the prosecution one week to file an Amended Affidavit. An Amended Affidavit was filed (R 8) and the Court thereupon ruled that the deficiencies of the original Affidavit were cured and denied the motion. (T.B. 1, 2). At the trial the Court made the same ruling (T. 18, 19)and over the objection of the Defendant allowed the fruits of the search to be admitted as evidence. (T 19). Judge Wahlquist found the Defendant guilty and sentenced him to serve a term in the state penitentiary (R 17).

ARGUMENT

POINT I

SINCE THE AFFIDAVIT ON WHICH THE SEARCH WARRANT WAS BASED DID NOT STATE FACTS SUFFICIENT TO SHOW PROBABLE CAUSE, THE SEARCH WARRANT WAS ILLEGALLY ISSUED AND VOID.

The Constitution of the Utate of Utah, Article I, Section 14, and the Federal Constitution Amendment

4, are word for word identical and each forbids the issuance of search warrants except on probable cause supported by oath or affirmation. Each states:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized."

The statutes of the State of Utah set out the manner and method of issuing Search Warrants in order to conform with the constitutional mandates. 77-54-3 U.C.A. 1953, is a rephrasing of a portion of the Constitution and makes a finding of probable cause supported by oath or affirmation a condition precedent to the issuance of a warrant.

77-54-4 U.C.A. 1953, requires an examination on oath of the complainant, the taking of a written deposition, and the susbscribing thereof. As a matter of practice, this section is usually conformed to by the swearing to and subscribing of a written Affidavit.

77-54-5 U.C.A. 1953, is a requirement that the deposition (Affidavit) must set forth the *facts* establishing probable cause.

77-54-6 U.C.A. 1953, requires a finding by the magistrate of the existence of probable cause after following the steps as set out in the previous sections.

The Affidavit (R-1A) which was subscribed and sworn to before Judge Mecham at the time the Search

Warrant was issued was made by Sergeant Hal R. Adair of the Ogden City Police Department. It is a form Affidavit developed by Sergeant Adair himself, to be used in obtaining Search Warrants. (T 15). The Affidavit states:

> "The undersigned, being duly sworn, deposes and says: That *he* has probable cause to believe . . . "

and at the bottom of the Affidavit where the form calls for facts tending to establish grounds for issuance of a Search Warrant, is typed:

> "Based on information immediately afforded me, I have probable cause to believe that marijuana is presently being concealed at the residence of Agoberto J. Garcia at 660 23rd Street, Ogden, Utah."

This is the only Affidavit subscribed to under oath at any time before Judge Mecham, the issuing magistrate. (T 6, 7) (T.P.H. 14).

The Utah Supreme Court has previously been presented with the question of the legality of a Search Warrant and the Warrant's supporting Affidavit. In the case of *Allen vs. Lindbeck, Justice of the Peace, et al.*, 97 Utah 471, 83 P2d 920, decided September 20, 1939, a definition of probable cause is given on page 477 to be:

> "Such an apparent state of facts that a discrete and prudent man would be led to belief that the accused at the time of the application for a Warrant was in possession of property sought to be seized."

and rejected a statutory requirement requiring merely that the Affiant have reason to believe and does believe. In deciding *Allen vs. Lindbeck*, this Court analyzed an extended series of annotations and case law in aligning itself with the overwhelming weight of authority which requires that the Affidavit must state the facts showing the grounds for probable cause. The case specifically cites and adopts *State vs. Arrequi,* 44 Idaho 43, 254 P 788, 52 A.L.R. 463, and the Idaho court's summarization of its examination of numerous authorities wherein it states:

> "Under the great weight of authority of both state and federal courts, a Search Warrant issued upon informtaion and belief unsupported by facts submitted to the magistrate and based upon the conclusion of the Affiant rather than the facts, is illegal and a search conducted there is unlawful and in violation of the constitutional provision with relation to searches and seizures."

In *Allen vs. Holbrook,* 103 Utah 319, 135 P2d 242, it was contended by Appellant (page 324):

> "That the Affidavit upon which the Search Warrant was issued was insufficient—that probable cause did not exist—and that the Search Warrant was illegel and void and the search conducted in pursuance thereof, wrongful and unlawful and violated the rights of the Plaintiff."

In sustaining the Appellant's contention, the Court analyzed the Affidavit filed to see if the Affidavit was sufficient to give probable cause. This analysis is done

under what was then Section 105-54-3 R.S.U. 1933, and is now 77-54-3 U.C.A. 1953, and Article I, Section 14, of the Constitution of the State of Utah, stating on page 330:

> "Under the case of Allen vs. Lindbeck, Justice of the Peace, et al. above, it was held that the Affidavit must set forth facts sufficient to cause a discrete and prudent man to believe that the accused had the property sought to be seized. The fact that the Affiant says that he has that belief in and of itself is not sufficient to make probable cause."

The Court concludes that the Affidavit is nothing but mere conclusions of the Affiant, there being (page 331):

> "No facts being set forth upon which a Complaint for perjury could be predicated if falsely given."

Allen vs. Holbrook therefore establishes the rule that the Affidavit must set out sufficient facts upon which a Complaint for perjury could be predicated if falsely given.

A further annotation covering this exact point, i.e., the sufficiency of Affidavit for Search Warrant, based upon Affiant's belief, based in turn on informatoin, investigation, etc., by one whose name is not disclosed, is found in 14 A.L.R. 2nd, page 605, following a reporting of the case of ***DeLacy vs. City of Miami,*** beginning on page 602, and gives numerous examples of particular allegations or recitals of Affidavits ruled insufficient by courts of various states.

Justice Goldberg, in *United States vs. Ventresca*, (1965) 13 L Ed 2d 684, stated on page 689:

> "This is not to say that probable cause can be made out by Affidavits which are purely conclusory, stating only the affiant's or informer's belief that probable cause exists without detailing any of the "underlying" circumstances upon which that belief is based. See Aguilar vs. Texas, supra. Recitals of some of the underlying circumstances in the Affidavit is essential if the Magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."

The Affidavit in question here states no facts whatsoever, but only that *Affiant* has information that gives him probable cause to believe. Applying the test of "probable cause" as set out in *Allen vs. Lindbeck*, supra, this Affidavit is insufficient to support a Search Warrant, as it sets out no facts whereby a discreet and prudent man would be led to the belief that the accused at the time of the application for a Warrant was in possession of property sought to be seized.

In applying the test of *Allen vs. Holbrook*, (supra), this Affidavit sets out no facts upon which a Complaint for perjury could be predicated. The Search Warrant itself (R-1B) states on its face that it is based on proof that Sergeant Adair has probable cause to believe, and does not state that the magistrate has made a finding of probable cause.

POINT II

THE TRIAL COURT DOES NOT HAVE THE POWER TO ORDER THE FILING OF AN AMENDED AFFIDAVIT IN ORDER TO MAKE A SEARCH WARRANT WHICH WAS ILLEGAL AND VOID UPON ISSUANCE A VALID SEARCH WARRANT.

At the conclusion of the argument of Defendant's Motion to Suppress on the 27th of February, 1967, Judge Wahlquist ruled (T.A. 1, 2) that the Affidavit sworn to and filed at the time of the issuance of the Search Warrant was insufficient and on the basis of that Affidavit a Motion to Suppress will lie. Then, however, he granted the prosecution one week to file an Amended Affidavit to allow what he termed the writing out of a true summary of what took place and to correct a clerical error. An Amended Affidavit (R-8) was filed under date of March 2, 1967, using the Court and cause of the action in the District Court of Weber County, Utah, and sworn to before a notary public by Sergeant Adair.

After filing an Amended Affidavit, Judge Wahlquist ruled on March 6, 1967, (T.B. 1, 2) that this Amended Affidavit cured the "technical" error. He stated (T.B. 1):

> "The Court interprets the law to require that the magistrate must make the basic decision himself. However, the Court also following the majority rule, and also a Utah rule that a judge

may act on hearsay, the Court does believe that if the information that is now in the Affidavit was given to a judge and he duly transcribed it it undoubtedly would result in a valid warrant. The Court does believe that the only deficiency actually existing here was the failure of the City Judge to transcribe it and put it into writing before he actually signed the Warrant."

On the point of the Court's authority to allow such amendment, I could find no cases where such an act had even been attempted. The cases all analyze the Affidavit filed at the time of the issuance of the Warrant, as this Court did in the well-reasoned cases of *Allen vs. Lindbeck* and *Allen vs. Holbrook*, (supra). The rule as stated in 79 CJS 866, is:

> "Constitutional or statutory provisions requiring that probable cause for the issuance of a Search Warrant be shown by sworn statements in writing are mandatory and must be complied with, and, hence, where such a statute is in force, a warrant issued on oral information is void. Moreover, where, as in the case in some of these jurisdictions, the statute requires the issuing officer to examine, on oath, affiant and any witnesses he may produce, in order to inquire into the truth of the Affidavit offered, this provision is likewise mandatory and must be complied with, and such officer is required to take their Affidavits or depositions in writing."

Utah, by statute, has established a very set method to be followed in the issuing of Search Warrants.

> 77-54-3 U.C.A. 1953 Conditions precedent. - A Search Warrant shall not issue except upon probable cause supported by oath or affirma-

tion, particularly describing the place to be searched and the person or thing to be seized.

77-54-4 U.C.A. 1953 Examination of complainant and witnesses. - The magistrate must, before issuing the warrant, examine on oath the complainant, and any witnesses he may produce, and take their depositions in writing, and cause them to be subscribed by the parties making them.

77-54-5 Depositions, what to contain. - The depositions must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.

It is to be noted that Sections 77-54-4, U.C.A. 1953, and 77-54-5, U.C.A. 1953, each uses the word "must", therefore making such requirement mandatory.

Judge Wahlquist's ruling is apparently based upon the evidence given at the preliminary hearing by Sergeant Adair and Judge Mecham to the effect that additional information was told to Judge Mecham prior to the swearing of the Affidavit. However, admittedly, none of the additional information was given by reason of an examination under oath as required by 77-54-3 U.C.A. 1953 and 77-54-4 U.C.A. 1953.

Sergeant Adair testified (T.P.H. 4):

"I typed up this Affidavit and took it up to the Judge's house where I informed him of the previous buys and everything and swore to this and signed it in his presence."

Judge Mecham testified (T.P.H. 11):

"We commented on the abbreviated form of the Affidavit. It was because of the brevity of

> the Affidavit that I swore Officer Adair and there was only one oath administered that I included in the oath the statements by the Officer which he affirmed relative to the truthfullness of his oath representations. In effect, I administered the oath, 'You do solemnly swear that the representations made here to me relative to the Affidavit and oral, and the allegations in the Affidavit are true and correct to the best of your knowledge, information and belief, so help you God?, and his answer was, 'I do,' or an affirmation of that nature."

That was the only oath given, the intent being to give it retrospective effect (T.P.H. 12). There was no oath administered that the Affiant would respond to an examination (T.P.H. 13), and the only information reduced to writing was the Affidavit in question, there being no separate written depositions (T.P.H. 14). No other Affidavit from Sergeant Adair or any other person was submitted t o Judge Mecham at the time of the obtaining of the Search Warrant (T. 6, 7).

Defendant duly objected to the admission of the evidence (T 5, 7), and to the admission of oral evidence not conforming to the statute mandate (T 8) and to the filing of th Amended Affidavit (T 10), and to the Amended Affidavit itself (T 13, 14), and to the admission of the fruits of the search (T 5, 17). All of the Defendant's objections were overruled.

In making his ruling in allowing the evidence of the fruits of the search (T 18, 19) after giving a fairly good statement as to why we have constitutional and

statutory provisions for the protection of the population, the Judge stated that:

> "The Court believes that the provisions of the testimony given must be under oath and also must be in writing as required by statute and is mandatory."

But that corrected Affidavits could be filed to correct defects in the issuance of the Search Warrant which are clerical rather than substantive. In so ruling, the Court stated (T 18):

> "The Court believes that the provisions that the right basis of the act shall be placed in writing is made to protect unfounded and careless issuance of Search Warrants and also, make it possible to ascertain at a later date, exact data on which basis it is issued and also for the person may either accept or deny a compliance with a Search Warrant when it is presented to him. In this case, I have no evidence of either acceptance or denial of the Search Warrant of the person that it is presented to."

The inference being that if the Defendant had forcibly resisted the officers making the search, perhaps the Judge's decision would have been different; a position that can have no basis in law.

POINT III

SINCE THE SEARCH AND SEIZURE WAS CONDUCTED UNDER A WARRANT ILLEGALLY ISSUED AND VOID, IT IS UN-

LAWFUL AND UNREASONABLE AND EVIDENCE OBTAINED THEREUNDER IS INADMISSIBLE.

In *Allen vs. Lindbeck,* (supra) the Court quotes from and adopts the language of *State vs. Arregui,* 44 Idaho 43, 254 P 788, 794, 52 A.L.R. 463, 473, wherein the Idaho Court summarized its examination of numerous authorities.

State vs. Arrequi is the subject case of the annotation of 52 A.L.R. 463. It is a well-reasoned case wherein the Idaho Court sided with those states who held that evidence obtained in violation of the U.S. Constitution Amendment 4 and the Idaho Constitution was inadmissible as constituting a violation of U.S. Constitution Amendment 5.

Mapp vs. Ohio, 376 U.S. 643, L.Ed 2 1081, 81 S Ct 1684, 84 A.L.R. 2d 933, decided June 19, 1961, has ruled that all evidence obtained by searches and seizures in violation of the 4th Amendment of the Federal Constitution is by virtue of the due process clause of the 14th Amendment, guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible in a state court. Hence the division between the states in regard to the admissibility of evidence obtained by unlawful search and seizure is abolished with all states now excluding unconstitutional evidence.

In the case of *Aguilar vs. Texas,* 378 U.S. 108, decided June 15, 1964, the Court analyzed an Affidavit which in relevant part recited that (page 109),

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law."

The Court analyzed the status of the law in regard to Search Warrants under the 4th and 14th Amendments, and particularly the Affidavit as set out above, and stated (page 115),

"We conclude, therefore, that the Search Warrant should not have been issued because the Affidavit did not provide a sufficient basis for a finding of probable cause, and that the evidence obtained as a result of the Search Warrant was inadmissable in Petitioner's trial."

In *U.S. vs. Menser*, 247 F. Supp., 826 (1965), a Habeas Corpus proceeding by a state prisoner, the United States District Court for the District of Connecticut, decided (page 831),

"The Affidavit here is fundamentally no more than the bare statement that the police received information from a reliable source that pool selling was being carried on at petitioners' premises. It nowhere discloses how the informant came to his stated conclusion. On what facts was it based? Did he actually see the pool selling being carried on or the "paraphernalia"? Did he hear it from another unmentioned source, or is his statement based on mere suspicion? "What the police say does not necessarily carry the day; 'probable caue' is in the keeping of the magistrate" . . . If, rather than the proper official, it is the police or, as in this case and in *Aguilar,*

> even an unidentified third party who decides whether the facts known to him are a sufficient indication that probable cause exists for the issuance of a warrant, the amendment would be reduced "to a nullity and leave the people's houses secure only in the discretion of police officers."

and continuing on page 832:

> "No matter how closely and how liberally the Affidavit is scrutinized, there is no "common sense" way, nor any other way, of importing into the informant's statement an answer to what *his conclusion* was based upon - and that is what *Aguilar* requires to be before the magistrate."

The Court thereupon ruled that (page 833) the admission of that evidence violated the Defendant's constitutional rights and issued the Writ of Habeas Corpus.

In the case of ***Benjamin Zesck vs. The People of the State of Colorado,*** 409 P2d 522, the Colorado Court in two short paragraphs reversed a conviction, stating:

> "The Search Warrant was obtained upon an Affidavit based upon the testimony of a policeman whose only source of information was a telephone call to the police department by a person who refused to give his name. Such an Affidavit does not meet the constitutional requirement set forth in *Hernandez* and *Aguilar*, supra."

In this case the Attorney General confessed that the trial court erred in admitting into evidence the fruits of a search under a Warrant constitutionally invalid.

As stated by Justice Goldberg in *United States vs. Ventresca,* supra., page 691:

"This court is alert to invalidate unconstitutional searches and seizures whether with or without a warrant . . . By doing so it vindicates individual liberties and strengthens the administration of justice by promoting respect for law and order."

CONCLUSION

In order that a Search Warrant be valid, the Constitutional and Statutory requirements must be met at the time of issuance. The trial court does not have the power to change these requirements or authorize an attempted compliance some two months after the Search Warrant was issued. A Search Warrant issued in violation of the constitutional and statutory mandates is void and a search thereunder unreasonable and unlawful. The fruits of such a search is inadmissible as evidence. The Defendant's Motion to Suppress should have been granted and as the Defendant's conviction is based entirely upon evidence that should not have been admitted, the conviction should be reversed.

Respectfully submitted,

RONALD O. HYDE
505 First Security Bank Bldg.
Ogden, Utah 84401

DALE E. STRATFORD
2640 Washington Blvd.
Ogden, Utah 84401

Attorneys for Defendant
and Appellant